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IN THE

Supreme Court of the United States

October Term, 1938

No. 118

JOSIAH V. THOMPSON as Trustee for Lida Eleanor Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald of the trusts hereinafter described, Lida Eleanor Purcell Fitzgerald, John Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald, infants, by William McClelland, their guardian *ad litem*

Plaintiffs

against

GERALD PURCELL FITZGERALD, individually and as Trustee of the trusts hereinafter described; CHARLES E. LENHART, as Trustee of the trusts hereinafter described, GERALD PURCELL FITZGERALD and CHARLES E. LENHART, partners as Fayette Coke Company and Shamrock Supply Company, CHARLES E. LENHART, Manager of Fayette Coke Company and Shamrock Supply Company

Defendants

PETITION OF PLAINTIFFS PRINCESS LIDA OF THURN AND TAXIS, FORMERLY LIDA ELEANOR PURCELL FITZGERALD, AND JOHN PURCELL FITZGERALD, FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF

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No.

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Plaintiffs,

against

GERALD PURCELL FITZGERALD, individually and as Trustee of the trusts hereinafter described; CHARLES E. LENHART, as Trustee of the trusts hereinafter described, GERALD PURCELL FITZGERALD and CHARLES E. LENHART, partners as Fayette Coke Company and Shamrock Supply Company; CHARLES E. LENHART, Manager of Fayette Coke Company and Shamrock Supply Company,

Defendants.

PETITION OF PLAINTIFFS PRINCESS LIDA OF THURN AND TAXIS, FORMERLY LIDA ELEANOR PURCELL FITZGERALD, AND JOHN PURCELL FITZGERALD, FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, AND BRIEF IN SUPPORT THEREOF

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of plaintiffs Princess Lida of Thurn and Taxis (formerly Lida Eleanor Purcell Fitzgerald), a citizen of Hungary, and John Purcell Fitzgerald, a citizen of New York, respectfully shows:

Your petitioners seek review of a final decree of the Supreme Court of Pennsylvania (329 Pa. 497; 198 Atl. 58) entered in the above-entitled action on March 21, 1938, affirming a decree (174a) of the Court of Common Pleas of Fayette County, Pennsylvania (hereafter called "the State Court"), which enjoined your petitioners from further prosecuting their action in the United States District Court for the Western District of Pennsylvania (hereinafter called "the Federal Court").

The Supreme Court of Pennsylvania held that the action before it and the Federal action involve the same subject matter and are actions *in rem* or *quasi in rem*, and that the State Court has exclusive jurisdiction because the State action was commenced prior to the Federal action.

On the very same day (March 21, 1938) on which the Supreme Court of Pennsylvania rendered its opinion, the Federal Court rendered also its opinion (not yet reported, but printed in Appendix A hereto), *arriving at a decision exactly contrary to the decision of the Supreme Court of Pennsylvania.* It held that the action in the State Court was an action *in personam*, that it had been terminated, and that in any event the State Court should not enjoin prosecution of the Federal Court action.

The action in the State Court was commenced October , 1910. Your petitioners contend that it was terminated ot later than May 25, 1925.

The action in the Federal Court is entitled "*Princess ida of Thurn and Taxis etc., et al.* v. *Andrew A. Thompon et al.*" and bears No. 2451 in Equity. This action as commenced July 8, 1930.

STATEMENT

The Trust Agreement

On December 6, 1906, an agreement (17a) was made etween Gerald Purcell Fitzgerald of the Island of Waterord, Ireland, of the first part; his wife, Lida Eleanor urcell Fitzgerald (now Princess Lida of Thurn and axis), of the second part; and Josiah V. Thompson, harles E. Lenhart, and said Gerald Purcell Fitzgerald, trustees, of the third part.

The agreement recites that Lida and Gerald were married in the year 1899; that they had the following children, John Purcell Fitzgerald, Edward Maurice Fitzerald, and Gerald Purcell Fitzgerald; and that on December 5, 1906, Lida divorced Gerald by decree of the High ourt of Justice in Ireland.

The agreement provides:

(1) For payments of alimony by Gerald to Lida, pending the absolute divorce which was eventually granted (44a); and for payments thereafter by Gerald to the trustees, for the benefit of Lida and the children, out of his profits from his nine-tenths interest in two partnerships, Fayette Coke Company and Shamrock Supply Company (16a-17a).

(2) Out of these profits Gerald is to pay to the trustees (a) for the benefit of Lida, an annuity of $15,000 for the first three years and $20,000 per year thereafter (18a), and (b) the difference between such annuity and one-third of his share of such profits until a fund of $300,000 shall be created (19a). Beginning February 1, 1908, and annually thereafter the income from such fund of $300,000, or from so much thereof as shall have been received and invested by the trustees, is to be paid to Lida and the children as therein provided (20a).

(3) Upon the death of Lida and the children, the principal of such fund shall be paid by the trustees to Gerald or his estate (20a-21a).

(4) Where a vacancy in the office of trustee occurs such vacancy is to be filled by the surviving trustees (21a).

This agreement was performed until June, 1910, when Gerald repudiated it (89a).

The State Court Action to Compel Performance

On October 27, 1910, a bill in equity was filed in the State Court by the other parties to the agreement to compel Gerald to perform and to remove him and Lenhart as trustees (15a).

State Court Decree of March 15, 1911

On March 15, 1911, the State Court entered its decree (141a), (1) directing that Gerald pay to the trustees the arrears under the agreement, (2) directing that the

agreed payments be a lien on Gerald's interest in the real property of Fayette Coke Company and Shamrock Supply Company, (3) removing Gerald as a trustee, (4) appointing a referee to take his account and granting judgment for the amount found due, (5) directing the two remaining trustees to appoint a third, (6) enjoining Gerald from disposing of his interest until the aforesaid fund of $300,000 had been accumulated, and (7) directing that Gerald pay the costs (141a-143a).

Lenhart was not removed.

Modifying Decree of March 5, 1915

On March 5, 1915 (151a), the State Court entered a modifying decree. This provided that Gerald shall assign to the trustees his nine-tenths interest in the sinking fund of Fayette Coke Company, amounting up to $88,783.20, which sum is to be used in payment of the arrears up to January 1, 1915 of $10,242.12 on the annuity to Lida and in payment of $78,491.08 toward the accumulation of a fund of $400,000, to be created for the purpose of insuring payment of said annuity of $20,000 to Lida. The modifying decree further provides that Gerald pay the sum of $321,508.92 (the balance of such fund of $400,000) to the trustees within seven years from January 1, 1915, such payment of $321,508.92 to be made out of a sinking fund to be provided by Gerald, and to be secured by a mortgage on Gerald's interest in the property of Fayette Coke Company (151a-154a).

Both State Court Decrees Fully Satisfied

The separate funds of $300,000 and $400,000 required to be created under the decrees of March 15, 1911 and March 5, 1915 were fully created and accumulated on or before May 25, 1925, and all that Gerald was required to do under them was done by him.

Both decrees were satisfied before the commencement of the Federal Court action (181a, 192a, 206a, 215a, 229a, 230a, 237a). In their brief in the Supreme Court of Pennsylvania, the trustees asserted that Gerald *"has made payment in full of all sums required by the original contract by him to be made"* (p. 49).

On June 3, 1925, prior to the commencement of the Federal Court action, the trustees filed in the State Court a satisfaction dated May 25, 1925, acknowledging the payment by Gerald of all sums of money which he was required to pay by any decree entered in the State Court action, and in consideration thereof satisfying said decrees in full of debt, interest and costs. (Opinion of SCHOONMAKER, *J.*, Appendix A, and copy of satisfaction, Appendix B hereto.)

The Federal Court Action

On July 8, 1930, your petitioners, as beneficiaries under the agreement of December 6, 1906, filed their bill of complaint in the Federal Court against the present trustees, Andrew A. Thompson, William W. Parshall and Robert H. Arnett, and the administrators of the Estate of G. S. Harah, deceased, a former trustee, alleging mismanagement of the trust funds, and praying that the

trustees be removed and that the defendants be made to account and to repay the losses (188a).

On July 29, 1930, the trustees filed a motion in the Federal Court to dismiss this bill of complaint for absence of indispensable parties, and because the State Court, by virtue of the aforesaid proceedings in the State Court, had exclusive jurisdiction of the controversy sought to be litigated in the Federal Court (195a).

On May 12, 1931, the Federal Court rendered its opinion denying this motion to dismiss and refusing to decide whether or not the State Court had exclusive jurisdiction until after answer had been filed and proof ordered (208a).

On May 18, 1931, the defendants filed their answer averring, *inter alia*, that the controversy was within the exclusive jurisdiction of the State Court (213a).

On April 17, 1937, your petitioners filed an amendment to the bill of complaint in the Federal Court action (230a), and on May 5, 1937, the trustees filed their answer thereto (236a).

Proceedings in State Court to Restrain Prosecution of Federal Court Action

On May 1, 1937, the trustees filed a petition in the State Court (159a) wherein they prayed that your petitioners be temporarily enjoined, and show cause why they should not be permanently enjoined from further prosecuting the Federal Court action. Their petition set forth the same reasons for the injunction as were set forth in their motion to dismiss the Federal bill (159a).

On June 17, 1937, your petitioner, Princess Lida of Thurn and Taxis, filed her answer (165a) to this petition.

She averred that the action in the State Court was one *in personam* to compel specific performance of the trust agreement of December 6, 1906; that that action had been finally terminated and the decrees therein satisfied; that no action remained pending in the State Court when the Federal Court action was commenced; that the action in the Federal Court was an action *in personam* and a separate and independent controversy, not growing out of the action in the State Court; and that the State Court did not have the power to deprive her of the right given to her by the Constitution and the laws of the United States to sue in the Federal Court (172a).

On June 29, 1937, a decree was entered in the State Court permanently enjoining your petitioners from further prosecuting the action in the Federal Court (174a).

On July 6, 1937, an appeal from that decree was taken to the Supreme Court of Pennsylvania, which, *on March 21, 1938*, handed down an opinion of affirmance (329 Pa. 497; 198 Atl. 58).

Proceedings in Federal Court to Restrain Respondents from Attempting to Enjoin Prosecution of Federal Court Action

On July 6, 1937, your petitioner, John Purcell Fitzgerald, filed a petition (246a) in the Federal Court praying that the respondents be enjoined from further prosecution of the proceedings in the State Court to enjoin your petitioners from prosecuting the Federal Court action.

On September 18, 1937, *the Federal Court granted such injunction*, and set November 8, 1937, as the date

for the hearing to determine the jurisdictional issue (257a). This issue was thereupon fully argued.

On *March 21, 1938*, the Federal Court rendered its opinion holding that it has jurisdiction over the action instituted by your petitioners therein; that its jurisdiction is not impaired by any proceedings had in the State Court; that the proceedings in the State Court were *in personam* and not *in rem* or *quasi in rem*; that when the decrees of 1911 and 1915 were fully satisfied on May 25, 1925, the jurisdiction of the State Court was at an end; and that the action should, therefore, proceed to trial in the Federal Court. See copy of Opinion, Appendix A hereto.

Other Proceedings in State Court

Since the commencement of the action in the State Court, there have been a number of changes in the personnel of the trustees, each new trustee having been chosen by the remaining trustees and such choice having been confirmed by the State Court (6a-10a).

On October 9, 1925, a First and Partial Account of the then trustees was filed in the State Court. No exceptions were filed thereto and it was confirmed by the State Court (9a).

On July 7, 1930, a Second and Partial Account of the then trustees was filed in the State Court. Exceptions were filed to said account by Gerald Purcell Fitzgerald but said account has not yet been passed upon by the State Court (11a).

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI.

A writ of certiorari should be granted:

1. To resolve the conflict of jurisdiction between the State Court and the Federal Court which have reached exactly opposite decisions as between the parties, thus creating an impasse. In *Penn General Casualty Co.* v. *Pennsylvania*, 294 U. S. 189, this Court granted a writ of certiorari to resolve a conflict of jurisdiction between a Court of Common Pleas of Pennsylvania, and a Federal District Court in that State, the Court saying at page 194 that:

> "The federal question, reviewable on appeal, is whether the state court has given proper effect to the proceedings and the order of the federal court. *Buck* v. *Colbath*, 3 Wall. 334, 340; *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter-House Co.*, 120 U. S. 141, 142; *Morgan* v. *Sturges*, 154 U. S. 256, 267; *Central National Bank* v. *Stevens*, 169 U. S. 432, 456; *Farmers Loan & Trust Co.* v. *Lake Street Elevated R. Co.*, 177 U. S. 51; *Wabash R. Co.* v. *Adelbert College*, 208 U. S. 38, 44, 54."

2. Because the decision of the State Court denies the right granted to, and asserted by, your petitioners (172a) under Section 24, subdivision 1, of the Judicial Code (28 U. S. C. A. § 41, subd. 1), to prosecute the Federal Court action.

3. Because, whether or not the State Court action was an action *in rem*, *quasi in rem*, or *in personam*, it was terminated prior to the commencement of the Federal Court Action.

4. Because both the State Court action and the Federal Court action are actions *in personam* and not actions *in rem* or *quasi in rem*, and the granting of an injunction against the further prosecution of the Federal Court action was, therefore, erroneous.

5. Because the decision of the Supreme Court of Pennsylvania is in conflict with *U. S.* v. *Klein*, 82 L. Ed. 582; *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613, and prior decisions of this Court, in that, even if the State Court action be an action *in rem* or *quasi in rem* and still pending, that Court's jurisdiction is exclusive only in so far as necessary for that Court's control and disposition of the property, and the Federal Court action does not interfere with the State Court's control and disposition thereof. The actions were and are for different purposes.

6. Because the State Court had no jurisdiction or power to enjoin, it being solely for the Federal Court to determine whether or not it would defer to the alleged prior jurisdiction of the State Court.

7. Because the State Court has decided a federal question of substance not heretofore determined by this Court or has decided it in a way not in accord with applicable decisions of this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Pennsylvania, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete tran-

script of the record and all proceedings in the case numbered and entitled on its docket, No. 172 March Term, 1937, Appeal from the Decree of Court of Common Pleas of Fayette County, at No. 618 in Equity, *Josiah V. Thompson, Trustee, et al.* v. *Gerald Purcell Fitzgerald,* individually and as Trustee, *et al.*, Appeal of Lida, Princess of Thurn and Taxis (Hungary), and John Purcell Fitzgerald, and that the said decree of the Supreme Court of Pennsylvania may be reversed by this Honorable Court, and that your petitioners may have such other relief and further relief in the premises as to this Honorable Court may seem meet and just;

And your petitioners will ever pray.

Dated June 9, 1938.

Respectfully submitted,

PRINCESS LIDA OF THURN AND TAXIS
and JOHN PURCELL FITZGERALD,
Petitioners.

by CHARLES H. TUTTLE,
of Counsel.

CHARLES H. TUTTLE,
R. MURRAY GIBSON, JR.,
GERALD J. CRAUGH,
Of Counsel.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Supreme Court of Pennsylvania is in 329 Pa. 497; 198 Atl. 58.

The opinion of the Court of Common Pleas of Fayette County, Pennsylvania, is on pages 179a-187a of the record.

The opinion of the Federal Court has not yet been reported, buf is printed in Appendix A hereto.

Jurisdiction

The decree of the Supreme Court of Pennsylvania was entered on March 21, 1938.

Jurisdiction to issue the writ is found in the provisions of Section 237b of the Judicial Code (28 U. S. C. A. § 344b).

In the State Court petitioners claimed a right and privilege under a statute of the United States (Section 24, subd. 1, of the Judicial Code, 28 U. S. C. A. § 41), when they asserted their right to prosecute the Federal Court action, given to them by the laws and Constitution of the United States (172a).

Petitioners "had the undoubted right under the statute to invoke the jurisdiction of the Federal Court." (*Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 234.)

ARGUMENT

A.

The State and Federal actions were for different purposes, presented different causes of action and sought different relief. Hence, the State Court had no power to enjoin the Federal action or to deprive the petitioners of their statutory rights in the Federal Court.

The bill of complaint in the State Court shows that, fundamentally, its purpose was to compel Gerald specifically to perform his side of the agreement of December 6, 1906 (15a-50a). The prayer for relief is, in substance, that he be ordered to deliver to the trustees the moneys which he had agreed to deliver to them, and that he and the defendant Lenhart (being the second of the three trustees) be removed from office (49a). Lenhart was charged with aiding Gerald "to withhold from the aforesaid trustees all sums due and payable to them by virtue of the aforesaid agreement of December 6, 1906" (48a).

This action terminated in the decrees of 1911 and 1915 which, true to the nature of the action, were merely decrees compelling specific performance by Gerald. These decrees granted nothing as against Lenhart; but, on the contrary, required Gerald to account to him (as trustee) and to Thompson (as the third trustee).

These decrees were fully satisfied by full compliance therewith by Gerald on or before May 25, 1925 (181a,

192a, 206a, 215a, 229a, 230a, 237a, and opinion of Judge SCHOONMAKER in Appendix A. See also filed Statement of Satisfaction, Appendix B).

On the other hand, the action in the Federal Court is one to compel the entirely different and subsequently substituted trustees, successors to Gerald, Lenhart and Thompson, to account for *their* actions as trustees and to fulfill *their* obligations as such (188a, 194a). The said trustees were charged with mismanaging the trust estate, unlawfully causing losses therein, and failing to account.

Of this action the Federal Court had full jurisdiction by reason of diversity of citizenship and the presence of the jurisdictional amount.

Hence, the two actions present entirely different parties, controversies and subject-matters; have altogether different purposes; and seek altogether different relief.

The State Court action was *on the written contract* to compel Gerald to perform it *in favor* of the then trustees. The Federal action was *on the fiduciary obligation* of entirely different trustees to hold them accountable for loss through *their* misconduct.

B.

The State Court action, whether *in rem, quasi in rem* or *in personam*, was terminated prior to the commencement of the Federal Court action. The State Court decrees had expressed no retention of jurisdiction.

Although the decree of March 15, 1911 impressed a lien upon the interests of Gerald in the real property to insure the payments, and although the decree of March 5, 1915,

directed that Gerald secure the payments by a mortgage on his interest in the real property, the fact is that the two funds of $330,000 and $400,000 which Gerald was required to create were created and fully accumulated and paid over to the trustees by Gerald prior to the commencement of the Federal Court action (181a, 192a, 206a, 215a, 229a, 230a, 237a).

In their brief in the Supreme Court of Pennsylvania, the trustees admit that Gerald "has made payment in full of all sums required by the original contract by him to be made" (p. 49).

On June 3, 1925, the trustees filed a satisfaction in the State Court dated May 25, 1925, wherein they acknowledged full payment by Gerald to them of all sums which he was required to pay by any decree entered in the State Court action and in consideration thereof satisfying said decrees in full of debt, interest and costs (Opinion of SCHOONMAKER, J., Appendix A, and Statement of Satisfaction, Appendix B).

At the most, jurisdiction of a court continues only "until the judgment shall be satisfied" (*Central National Bank* v. *Stevens*, 169 U. S. 432, 464).

The decrees of March 15, 1911 (140a-143a), *and March 5, 1915* (151a-154a), *did not direct the trustees to perform any act.* Their duties were fixed only by the agreement of December 6, 1906. Those decrees ran against Gerald, not against the other trustees. Neither of said decrees nor said agreement required the trustees to account to the Court; nor did they require any supervision of the trust or the trustees by the Court.

It is true that the decree of March 15, 1911, provided that if the trustees remaining after the removal of Gerald could not agree upon a third trustee, then they should

eport their disagreement to the Court (142a). However, he remaining trustees did agree upon a third trustee n place of Gerald, and it was not necessary for them o make any report to the Court (6a-7a). The trustees id report at that time the appointment of the third trus- ee in place of Gerald and did also report to the Court ubsequent changes in the personnel of the trustees, at hich times the Court entered orders confirming the ap- ointment of substitute trustees (7a-10a). These were ll voluntary, *ex parte* and merely incidental proceedings pon the part of the trustees, not required under either f the decrees or the agreement of December 6, 1906.

Similarly, the filing of the First Partial Account on October 9, 1925 (9a), and the filing of the Second Partial Account on July 7, 1930 (10a), were voluntary *ex parte* proceedings not required by the agreement or either of he said decrees. Under the decree of March 15, 1911, ll that remained to be done after the appointment of the hird trustee in place of Gerald was the making of the equired payments and deliveries by Gerald to the trus- ees,—requirements which were fully met before the Fed- ral action began.

As said by Judge SCHOONMAKER in his opinion in the ederal action (Appendix A hereto): —

> "No court action would be necessary to enable the trustees to carry out fully the terms of the trust, and to dispose of the property when the trust was terminated, for that was all provided for by the trust-agreements. True, the trustees did file two accounts in the Court of Common Pleas, but that was a voluntary act on their part. There is no provision in the trust-agreement for filing such accounts in court, nor is there any provision in

> the decrees of the court for such accounts to be filed." • • •
>
> "Any subsequent charges of mismanagement or misconduct on the part of the trustees would be the subject of the court inquiry only when jurisdiction was invoked by some party aggrieved by such mismanagement or misconduct."

Furthermore, the State Court did not provide in the decree of March 15, 1911, or the decree of March 5, 1915, that it retained jurisdiction of the action.

In *Tyronza Special School District* v. *Speer*, 94 F. (2d), 825 (C. C. A. 8), a conflict of jurisdiction arose between a State Court and a Federal Court. The Court held that, since the decree of the State Court had not provided that jurisdiction was retained over any property, the State Court suit had terminated upon the entry of a decree. The Court said (p. 828):

> "We cannot find that the state court was then exercising its jurisdiction over any res. Even if it could be said that the suit commenced by Collins was in rem, the decree entered therein on May 6, 1935, dismissed that proceeding without retaining jurisdiction over any property."

In *State ex rel. McManus* v. *Muench*, 217 Mo. 134, 117 S. W. 25, the Court held that where a decree has been entered in a suit involving a trust and a decree has been entered appointing a new trustee, the power of the Court in the subject matter of that particular suit is exhausted and at an end. The Court said (pp. 139-140 of 217 Mo.)

> "• • • having invested him (the new trustee) with title, the power of the court in the subject-matter

of that particular suit was exhausted and at end. This certainly is so unless we adopt the heresy that a court, *sua sponte*, may hold a trust estate in its grasp for all purposes of administration under some droll notion that, once in chancery for any purpose whatsoever, a trust estate is always in chancery for all purposes whatsoever."

C.

The State Court and the Federal Court actions are both actions *in personam* and not actions *in rem* or *quasi in rem*.

The State Court action was an action to compel specific performance by Gerald of the agreement of December 6, 1906. The State Court never had possession of any *res*. The trustees were not officers of the State Court like receivers. They were provided for in the agreement, and the office which they held was created by the agreement. The property in the trustees' possession was "not in *custodia legis* as in case of receivers" (*Commonwealth Company* v. *Bradford*, 297 U. S. 613, 619).

The trustees were not required by the trust agreement or by any decree of the State Court to file accounts in the State Court. Under the agreement the trustees were empowered to appoint substitute trustees without the necessity of resorting to the State Court (21a).

In other words, the trust was fully capable of performance without any participation by the State Court.

As was said in *Hinkley* v. *Art Students League*, 37 F. (2d) 225, 226 (C. C. A. 4), cert. denied 281 U. S. 733:

> "The trustees were not appointed such by the court, and they did not acquire possession of the property by an order of the court. The possession of a sheriff by virtue of a writ issued by his court, or the possession of receivers, taken by virtue of an order of the court appointing them, is by general consent to be regarded as the possession of the court. But it seems to us an unauthorized and improper extension of the non-interference doctrine to treat the possession of the trustees here as the possession of the circuit court of Baltimore city. On the other hand, the trustees are more reasonably regarded as mere suitors who have possession of the property in dispute; but whose possession could not prevent the trial court from taking jurisdiction to grant the relief asked in the bill."

Clearly, therefore, the State Court did not have possession of any *res* and the action before it was one *in personam*.

Similarly, the Federal Court action is an action *in personam*. In that action plaintiffs merely asked (1) that the trustees be required to account, (2) that the trustees be removed, (3) that the trustees be required to give bond for the faithful performance of their duties, and (4) for such other and further relief as may be just. An action to remove a trustee has been definitely declared to be an action *in personam* and not an action *in rem*. *Parker* v. *Kelley*, 166 Fed. 968, 971 (C. C. W. D. N. Y.); and an action to compel a trustee to account is likewise an action *in personam* and not *in rem*, *Brown* v. *Duffin*, 13 F. (2d) 708, 710 (C. C. A. 6).

D.

Even if the State Court action be an action *in rem* or *quasi in rem* and be not terminated, the Federal Court action does not interfere with the State Court's possession of any *res*.

In *U. S.* v. *Klein*, 82 L. Ed. 582, decided by this Court on February 28, 1938, the rule was reiterated that even if an action *in rem* or *quasi in rem* is pending in one Court, that Court's jurisdiction is exclusive only in so far as necessary for the control and disposition of the *res*.

Even if there had been any *res* in the State Court action, that *res* was only the money which Gerald had agreed to deliver to the trustees; and the sole purpose of that action was to compel him to turn over that money to the trustees. Only to that extent would the State Court have jurisdiction over a *res* (if there were any) and any right to control and dispose of it. On the other hand, since the action in the Federal Court is solely to compel the trustees to account and to remove them for their personal misconduct, that action could not interfere in any way with the (alleged) *res* which the State Court action undertook to get from Gerald and give to the trustees.

Moreover, even if it also be assumed for the sake of argument that there is a *res* in the Federal Court action also, that *res* would be altogether different from the (alleged) *res* which the State Court action sought to get from Gerald and deliver to the trustees. The latter *res* could only be Gerald's money; whereas the former could only be the trust property in the hands of the trustees.

See opinion of Judge SCHOONMAKER, Appendix A hereto.

E.

In any event, the State Court had no right or power to enjoin the action in the Federal Court.

Although cases may be found where a Federal Court has deferred to a previously acquired jurisdiction by a State Court of an action *in rem*, it is for the Federal Court and not for the State Court to decide that question.

We have found no case where either this Court or a lower Federal Court has held that a State Court may enjoin proceedings in a Federal Court.

Many cases state the general or theoretical rule that the court which first acquires jurisdiction of an action *in rem* retains jurisdiction to the exclusion of any other court (*Kline* v. *Burke Constr. Co.*, 260 U. S. 226); but we have found no case where this Court has recognized the right of a State Court to *enjoin* a Federal Court action even though the State Court action be *in rem*. The proper procedure is to apply to the Federal Court for a stay of the Federal Court action pending the final determination of the State Court action.

It was so held in the leading case of *Freeman* v. *Howe*, 24 How. 450. There this Court said (p. 459):

> "But the question is, which tribunal, the Federal or State, possesses the power to determine the question of jurisdiction or validity of the process? * * * We regard the question as settled * * * that it belongs to the Federal Courts to determine the question of their own jurisdiction, the ultimate arbiter, the supreme judicial tribunal of the nation, and which has been recently reaffirmed, after the most careful and deliberate consideration, in the opinion of the present Chief Justice, in the case of the *United States* v. *Booth* (21 How. 506)."

A similar expression is found in *Moran* v. *Sturges*, 154 U. S. 256, where this Court said (p. 286):

> "That the question of jurisdiction was, as the case stood, one for the District Court to decide in the first instance; that the District Court had jurisdiction and that the judgment under review was in effect an unlawful interference with proceedings in that Court."

Rose's Notes (Revised Edition), Vol. 5, contains the following footnote to *Freeman* v. *Howe*, *supra* (p. 474):

> "*It belongs to Federal courts to determine question of their own jurisdiction, the Supreme Court being the ultimate arbiter.*
>
> "Approved in Nashville *v.* Cooper, 6 Wall. 253, 18 L. Ed. 853, holding Federal court had jurisdiction where acts complained of were done under military authority of United States; Fitzgerald *v.* Fitzgerald & Mallory Constr. Co., 44 Neb. 495, 62 N. W. 910, declining to review finding of Federal court that latter had no jurisdiction of case."

In the *Fitzgerald* case just referred to, the Supreme Court of Nebraska declined to examine the grounds for a conflict of jurisdiction and said (44 Neb. 495):

> "It is a sufficient answer that in all cases of apparent conflict between the state and federal courts the latter are the exclusive judges of their jurisdiction over the subject of the action (*Freeman* v. *Howe*, 24 How. (U. S.), 459)."

See also *Hines & Hobbs* v. *Rawson*, 40 Ga. 356; and *Shelby* v. *Bacon*, 10 How. 56, 70-71.

In *Central National Bank* v. *Stevens*, 169 U. S. 432, this Court, in reversing a determination of the Court of

Appeals of New York affirming an injunction granted by the Supreme Court of that State against certain proceedings in the Federal Court, acknowledged the general rule that "the courts of one country", having the necessary parties before them, may in equity enjoin such parties from proceeding with a suit in the courts "of another country"; but this Court, quoting from Story's Eq. Jur. § 899, said (p. 463):

> "The learned judge overlooked the passage immediately following, and hereinbefore quoted: 'There is one exception to this doctrine which has been long recognized in America, and that is that the state courts cannot enjoin proceedings in the courts of the United States, nor the latter in the former courts. This exception proceeds upon peculiar grounds of municipal and constitutional law, the respective courts being entirely competent to administer full relief in the suits pending therein.' Nor did the decision of this court in *Peck* v. *Jenness*, already cited, receive attention, wherein it was said, after adverting to the proposed distinction between enjoining a court and enjoining suitors therein, 'The fact that an injunction issues only to the parties before the court and not to the court is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum.'"

In *American and English Annotated Cases*, Vol. 11, there is the following statement (p. 744):

> "The general rule that there is no authority in the state courts to enjoin proceedings in the courts of the United States has been laid down definitely and distinctly in numerous decisions."

In the case at bar the Federal Court has not only held that the action in the State Court is not an action *in rem* but that such action has been terminated, and that the Federal Court has jurisdiction of the action before it. Jurisdiction having been properly invoked in the Federal Court, the Federal Court is bound to determine the issues raised in that action. In *Commonwealth Company* v. *Bradford*, 297 U. S. 613, 618, this Court said:

> "Jurisdiction having been properly invoked (in the Federal Court) it became the duty of the trial court to determine the issues, unless required by rules based on comity to relegate the complainant to the state court." (Matter in parentheses inserted.)

Here again is a recognition that the matter of jurisdiction is one for the Federal Court alone to determine. That Court, as a matter of comity, may surrender jurisdiction where a prior action *in rem* has been commenced in the State Court, but that is altogether different from saying that the State Court may *force* comity upon the Federal Court by injunction. Any such holding would, in effect, give to the State Court *appellate* power over the Federal Court on every question of comity arising in the Federal Court for *its* decision.

F.

For the foregoing reasons a writ of certiorari should be granted.

Dated June 9, 1938.

Respectfully submitted,

CHARLES H. TUTTLE,
R. MURRAY GIBSON, JR.,
GERALD J. CRAUGH,
Of Counsel.

APPENDIX A

(Opinion of Federal Court)

UNITED STATES DISTRICT COURT

Western District of Pennsylvania

Princess Lida of Thurn and Taxis, a Citizen of the Kingdom of Hungary; and John Purcell Fitzgerald, a Citizen of the State of New York, v. Andrew A. Thompson, William W. Parshall and Robert H. Arnett, Trustees for the Plaintiffs and others, and John S. Harah and Second National Bank of Uniontown, Pennsylvania, A Corporation Created and Existing under the laws of the United States, Administrators of the Estate of G. S. Harah, deceased, former Trustees for the Plaintiffs and others, all of whom are citizens of the Commonwealth of Pennsylvania.	No. 2451 Equity

OPINION

(Filed Mar. 21, 1938)

Schoonmaker, *Judge*:

This is an action in equity wherein plaintiffs, as beneficiaries under a trust created by agreement dated December 6, 1906, between Gerald Purcell Fitzgerald of the first

part; Lida Eleanor Purcell Fitzgerald of the second part; and Josiah V. Thompson, Gerald Purcell Fitzgerald, and Charles E. Lenhart, Trustees, of the third part, charge the defendants Andrew A. Thompson, William W. Parshall, and Robert H. Arnett, the present trustees under said agreement, and John S. Harah and the Second National Bank of Uniontown, Pennsylvania, Administrators of G. S. Harah, deceased, who was a former trustee under said agreement, with mismanagement of the trust-estate created pursuant to said agreement, the loss of money through illegal and negligent conduct in the making of loans and investments from said funds, and ask that they be required to restore all moneys lost through negligence to the trust fund, that they be removed as trustees, and that all trustees appointed be required to give bond for the faithful discharge of their duties.

The defendants answer, denying all misconduct and negligence, averring that the Court of Common Pleas of Fayette County, Pennsylvania, first acquired and still retains sole and exclusive jurisdiction to hear and determine all matters of which the plaintiffs complain by reason of the pendency in that court of a suit in equity at No. 618, filed on October 27, 1910, between Josiah V. Thompson, *et al.*, as plaintiffs; and Gerald Purcell Fitzgerald, *et al.*, as defendants.

We set the case down for trial solely on the jurisdictional question. On this trial, an exemplified copy of the record in the Fayette County Court of Common Pleas case was introduced in evidence. By the record, it appears that Josiah V. Thompson, as trustee for Lida Eleanor Purcell Fitzgerald, John Purcell Fitzgerald, Edward Maurice Fitz-

gerald, and Gerald Purcell Fitzgerald; and Lida Eleanor Purcell Fitzgerald in her own right; John Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald, infants, by William McClelland, their guardian *ad litem*, brought suit against Gerald Purcell Fitzgerald, individually and as trustee of the trusts described in the bill of complaint; Charles E. Lenhart, as trustee of the trusts described in the bill of complaint; Gerald Purcell Fitzgerald and Charles E. Lenhart, partners as Fayette Coke Company and Shamrock Supply Company; and Charles E. Lenhart, manager of Fayette Coke Company and Shamrock Supply Company.

This suit is based on the agreement made on the 6th day of December, 1906, between Gerald Purcell Fitzgerald of the Island of Waterford in Ireland, of the first part; Lida Eleanor Purcell Fitzgerald, of the second part; and Josiah V. Thompson, Charles E. Lenhart, and said Gerald Purcell Fitzgerald, as trustees, of the third part. This agreement recites that Lida and Gerald were married in the year 1899, and that the following children were born as the issue of said marriage, to-wit: John Purcell Fitzgerald; Edward Maurice Fitzgerald; and Gerald Purcell Fitzgerald; that Lida was divorced from Gerald by decree of divorce, *a mensa et thoro*, on December 5, 1906, by the High Court of Justice in Ireland. The agreement then provides for alimony payments by Gerald to Lida pending an absolute divorce by Act of Parliament, and provides thereafter for certain payments to the trustees named in the agreement for the benefit of Lida and the children from profits accruing from operation of Fayette Coke Company and the Shamrock Supply Company.

Appendix A

In that suit at No. 618 in Equity in the Fayette County Court of Common Pleas, the bill of complaint set out this trust agreement of December 6, 1906, and charged that the defendant, Gerald Purcell Fitzgerald, had violated the trust agreement in that he had forbidden Lenhart, manager of the properties of the Fayette Coke Company and the Shamrock Supply Company, to pay over to the trustees provided in said agreement, the sums contemplated and set apart by the terms of said agreement, and that he had wholly repudiated said agreement. The bill further charged that the defendant Lenhart had carried out said instructions from defendant Fitzgerald and had failed to discharge his duties as a trustee under said agreement.

The bill of complaint in that case contained the following prayers for relief:

(The Court then sets forth in full the prayer for relief which, for the sake of brevity, is omitted, as it is printed at pages 48a-50a of the record.)

Issue having been joined by answers filed by the defendant, the Court of Common Pleas of Fayette County proceeded to a trial of the issues joined, and thereafter entered the following decree:

(The Court then sets forth in full the decree of March 15, 1911, which is printed at pages 140a-143a of the record.)

Thereafter, and on March 5, 1915, the Trustees and defendant Fitzgerald presented their petition to the Court of Common Pleas of Fayette County, setting up an alteration

in the original agreement of December 6, 1906, and praying for a modification of the decree of March 15, 1911, to correspond therewith. Whereupon, the following consent-decree was entered:

(The Court then sets forth in full the decree of March 5, 1915, which is printed at pages 151a-154a of the record.)

On May 25, 1925, the Trustees acknowledged receipt by them from defendant Fitzgerald of all moneys which he was required to pay by any decree entered in the Fayette County Court of Common Pleas and satisfied said decrees in full of debt, interest and costs. This satisfaction was filed in that court on June 3, 1925.

The Trustees have filed in the Court of Common Pleas of Fayette County two financial reports of the operation of their trust, one December 7, 1925, which was confirmed by the court, no exceptions being filed thereto; and one on July 7, 1930, to which exceptions were filed by Gerald Purcell Fitzgerald. The court has taken no action with reference to these exceptions.

On May 1, 1937, the present trustees filed a petition in the Fayette County Court of Common Pleas, asking that court to enjoin the plaintiffs in the instant suit from prosecuting this action in this court.

A rule to show cause was granted by that court why this injunction should not issue, and after hearing, the court, on June 29, 1937, made the rule absolute, stating in an opinion filed by Hudson, *P. J.*, in part as follows:

"The position of the trustees is that the institution of the original action, the various proceedings had therein, and the several decrees entered, conferred upon this court complete and exclusive jurisdiction, and that as a result no court of co-ordinate jurisdiction may interfere with the subject matter of the litigation. In other words, they claim that the funds involved are trust funds; that they were in effect created by the decrees of this court; that this court has the constructive possession and potential control thereof, and that the administration of the funds is exclusively within the control of this court.

"The three judges who heard the argument are in accord with that view and accordingly the rule was made absolute.

"These funds are an entity, a thing, or res; they are a trust fund held by the trustees for the use of beneficiaries, and are to be administered and distributed only by the trustees. Obviously, an action having these funds as the subject matter and dealing with their administration is in rem."

The plaintiffs in the instant suit thereupon, on July 6, 1937, entered an appeal from the order of the Fayette County Court to the Supreme Court of Pennsylvania, where the case is now pending and undecided.

In our view, the proceedings in the Court of Common Pleas of Fayette County were not in *rem* or *quasi in rem*, but were rather *in personam* for the specific performance of the agreement of December 6, 1906, by defendant Fitzgerald and his co-defendant Lenhart, who, acting with him as one of the trustees under the agreement, were trying to repudiate that agreement, and not to comply with its terms.

When the decrees of that court were completely satisfied by the trustees on May 25, 1925, then the jurisdiction of the Court of Common Pleas of Fayette County was at an end. From then on, the trustees would function, not under the guidance of the court as in a receivership case, but under terms of agreement of trust of December 6, 1906, as modified by the subsequent agreement of March 5, 1915. No court action would be necessary to enable the trustees to carry out fully the terms of the trust, and to dispose of the property when the trust was terminated, for that was all provided for by the trust-agreements. True, the trustees did file two accounts in the Court of Common Pleas, but that was a voluntary act on their part. There is no provision in the trust-agreement for filing such accounts in court, nor is there any provision in the decrees of the court for such accounts to be filed.

We, therefore, cannot see that the court acquired any jurisdiction over the *res* of the estate merely by the fact that the trustees filed such accounts in the Court of Common Pleas.

Any subsequent charges of mismanagement or misconduct on the part of the trustees would be the subject of the court inquiry only when jurisdiction was invoked by some party aggrieved by such mismanagement or misconduct.

Even had the Court of Common Pleas of Fayette County taken possession of the property involved in the trust agreements, its jurisdiction would be exclusive only so far as necessary for that court's control and disposition of the property. The latest word on this subject comes from the Supreme Court of the United States in the case

of U. S. *v.* Philip Klein, Escheator, No. 439, decided February 28, 1938, involving the escheat of money deposited in the registry of a Federal court. There, Mr. Justice Stone, delivering the opinion of the court, says:

> "While a federal court which has taken possession of property in the exercise of the judicial power conferred upon it by the Constitution and laws of the United States is said to acquire exclusive jurisdiction, the jurisdiction is exclusive only in so far as restriction of the power of other courts is necessary for the federal court's appropriate control and disposition of the property. Penn General Casualty Co. *v.* Pennsylvania, 294 U. S. 189; see Leadville Coal Co. v. McCreery, 141 U. S. 475, 477. Other courts having jurisdiction to adjudicate rights in the property do not, because the property is possessed by a federal court, lose power to render any judgment not in conflict with that court's authority to decide questions within its jurisdiction and to make effective such decisions by its control of the property. Penn General Casualty Co. *v.* Pennsylvania, supra; see Heidritter *v.* Elizabeth Oilcloth Co., 112 U. S. 294, 304; cf. Buck *v.* Colbath, 3 Wall. 334, 342; Riehle *v.* Margolies, 279 U. S. 218. Similarly a federal court may make a like adjudication with respect to property in the possession of a state court. Yonley *v.* Lavendar, 21 Wall. 276; Byars *v.* McAuley, 149 U. S. 608, 620; Security Trust Co. *v.* Black River National Bank, 187 U. S. 211, 227; Waterman *v.* Canal-Louisiana Bank & Trust Co., 215 U. S. 33, 43, 46; Commonwealth Trust Co. *v.* Bradford, 297 U. S. 613, 619; General Baking Co. *v.* Harr, 300 U. S. 433."

Therefore, there being diversity of citizenship and the requisite amount being involved, we hold that this court has jurisdiction to hear and determine the issues raised by the pleadings in this case. The case may be set down for trial on the equity-calendar.

Appropriate findings and an order may be submitted accordingly.

APPENDIX B

(Satisfaction Filed in State Court on June 3, 1925 of all Decrees of That Court)

IN THE

COURT OF COMMON PLEAS OF FAYETTE COUNTY

Between J. V. THOMPSON, *et al.*, *Plaintiffs,* and GERALD PURCELL FITZGERALD, *et al.*, *Defendants.*	No. 618 In Equity

We, WILLIAM W. PARSHALL, G. S. HARAH and A. A. THOMPSON, trustees, duly appointed by sundry decrees entered by the said court in the said cause, duly qualified and acting, hereby acknowledge payment by Gerald Purcell

Fitzgerald, one of the defendants, of all sums of money which he by any decree entered in the said cause was required and commanded to pay, and in consideration thereof we hereby satisfy the said decrees in full of debt, interest and costs.

Witness our hands and seals, this 25th day of May, 1925.

William W. Parshall	Seal
G. S. Habah	Seal
A. A. Thompson	Seal

Signed, Sealed and Delivered in the presence of

Charles L. Lewellyn
E. C. Higbee

Before me, a notary public in and for said county and state personally came the above named William W. Parshall and A. A. Thompson and in due form of law acknowledged the foregoing satisfaction of decree to be their act and each of their act and deed as trustees, and desired that it be recorded as such.

In Witness Whereof, I have hereunto set my hand and notarial seal this 25th day of May, 1925.

Charles L. Lewellyn
Notary Public
My Commission expires February 8, 1927.